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In the Supreme Court of the United States

OCTOBER TERM, 1989

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
NATIONAL TREASURY EMPLOYEES UNION

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

WILLIAM E. PERSINA *
Solicitor

ARTHUR A. HOROWITZ
Associate Solicitor

ROBERT J. ENGLEHART
Attorney
Federal Labor Relations Authority
500 C Street, S.W.
Washington, D.C. 20424
(202) 382-0781

* Counsel of Record

59pp

QUESTION PRESENTED

Whether the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135, authorizes negotiated grievance procedures in collective bargaining agreements to include grievances over whether management violated OMB Circular A-76 when making determinations to contract out bargaining unit employees' jobs.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-9a) is reported at 862 F.2d 880. The decision and order of the Federal Labor Relations Authority (Pet. App. 10a-18a) is reported at 27 F.L.R.A. 976.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-20a) was entered on December 2, 1988 and a petition for rehearing was denied on February 28, 1989 (Pet. App. 21a). On May 22, 1989, the Chief Justice extended the time within which to file a petition for a writ of certiorari to June 28, 1989. The

petition was filed on that date and was granted on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioner's brief has reproduced the relevant statutory provisions (Pet. Br. at 2-4), with the exception of 5 U.S.C. 7121(c). The relevant portions of 5 U.S.C. 7121 are reproduced in the appendix to this brief (FLRA App., *infra*, 1a-2a).

STATEMENT

A. Background

1. The Federal Service Labor-Management Relations Statute

Labor-management relations in the federal service are governed by the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. 7101-7135. Under the Statute, the responsibilities of the Federal Labor Relations Authority (Authority), a three-member independent and bipartisan body within the Executive Branch, include, among other things, adjudicating collective bargaining disputes and providing leadership in establishing policies and guidance relating to matters arising under the Statute. 5 U.S.C. 7104-7105. The Authority performs a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 92-93 (1983); *Federal/Postal/Retiree Coalition* v. *Devine*, 751 F.2d 1424, 1430 (D.C. Cir. 1985). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 97.

Under the Statute, a federal agency must bargain in good faith with the exclusive representative of an appropriate bargaining unit about unit employees' conditions of employment. 5 U.S.C. 7103(a)(12), 7114(b)(2). The term "conditions of employment" is defined as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions * * *." 5 U.S.C. 7103(a)(14). However, there is no duty to bargain over contract language which would bring about an inconsistency with a federal law, government-wide rule or regulation, or an agency regulation for which a compelling need exists. 5 U.S.C. 7117(a).

The Statute also contains a management rights clause that removes the exercise of certain management authority from the scope of negotiations. 5 U.S.C. 7106. As here pertinent, the Statute reserves as nonnegotiable, subject to subsection (b) of Section 7106, the authority of management "in accordance with applicable laws * * * to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B); *NFFE, Local 1167* v. *FLRA*, 681 F.2d 886, 892 (D.C. Cir. 1982). Subsection (b) of Section 7106 provides in relevant part that nothing in Section 7106 shall preclude an agency and an exclusive representative from negotiating procedures which management officials of the agency will observe in, and appropriate arrangements for employees adversely affected by, the exercise of any authority by management officials under Section 7106. 5 U.S.C. 7106(b)(2) and (3).

In the instant case, the Authority adjudicated a dispute over whether a collective bargaining proposal is within the duty to bargain established by the Statute. 5 U.S.C. 7105(a)(2)(E), 7117(c). Under the Statute, if a federal agency alleges that a bargaining proposal is outside the duty to bargain, the exclusive representative may appeal the agency's allegation of

nonnegotiability to the Authority. 5 U.S.C. 7117(c). The Authority examines the disputed proposal based on the record presented to it by the parties. *NFFE, Local 1167* v. *FLRA*, 681 F.2d at 891. If the Authority finds the proposal within the duty to bargain, the Authority orders that the agency upon request, or as otherwise agreed to by the parties, bargain over the proposal. 5 C.F.R. 2424.10. The bargaining obligation imposed by the Statute does not require the agency to agree to the proposal or to make a concession. 5 U.S.C. 7103(a)(12); *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1147 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

The Statute requires that, at the request of either party, the product of collective bargaining negotiations be reduced to a written collective bargaining agreement. 5 U.S.C. 7103(a)(12), 7114(b)(5). Such a collective bargaining agreement must "provide procedures for the settlement of grievances, including questions of arbitrability." 5 U.S.C. 7121(a)(1). Absent agreement otherwise by the parties, the Statute defines broadly the kinds of disputes that are grievable under a negotiated grievance procedure. 5 U.S.C. 7103(a)(9) and 5 U.S.C. 7121(a). See *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d 640, 641-642 (D.C. Cir. 1983). The Statute "is virtually all-inclusive in defining 'grievance'";[1] Section 7121 lists only five subject matters that are stat-

[1] H.R. Rep. No. 1403, 95th Cong., 2d Sess. 40 (1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 686 (Comm. Print No. 96-7) [hereinafter *Leg. Hist.*].

utorily excluded from the permissible scope of the negotiated grievance procedure.[2]

2. The EEOC Litigation, Which Preceded the Instant Case

a. In *AFGE, National Council of EEOC Locals and EEOC*, 10 F.L.R.A. 3 (1982), the Authority held negotiable the following proposals:

> The EMPLOYER agrees to comply with OMB Circular A-76 and other applicable laws and regulations concerning contracting-out.[3]

In finding the proposal negotiable, the Authority determined that the proposal did not impair EEOC's right to make contracting-out determinations because the proposal did not impose any substantive limitations upon management's right to make contracting-out determinations apart from those already existing (10 F.L.R.A. at 3).[4] Thus, because the proposal sim-

[2] The five subject matters excluded are set forth in Section 7121(c) (see App., *infra*, 2a). See, *e.g., The Veterans Administration Medical Center, Togus, Maine and AFGE, Local 2610*, 17 F.L.R.A. 963 (1985); *Federal Aviation Administration, Department of Transportation, Tampa, Florida and Federal Aviation Science and Technological Association, NAGE, Tampa, Florida*, 8 F.L.R.A. 532 (1982). Parties can, in negotiations, agree to exclude additional matters. 5 U.S.C. 7121(a)(2).

[3] OMB Circular A-76 (Circular) applies to Executive agencies and provides direction for agency decisions whether to contract out to private enterprise for products and services the government needs. 44 Fed. Reg. 20,556 (1979), as amended by 45 Fed. Reg. 69,322 (1980); 47 Fed. Reg. 6511 (1982); *id.* at 46,783; 48 Fed. Reg. 37,110 (1983); 50 Fed. Reg. 32,812 (1985).

[4] The Authority distinguished this proposal from one it had found nonnegotiable in *NFFE, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group*

ply obligated EEOC to act in accordance with whatever laws and regulations may be extant at the time EEOC exercises its right to contract out, the Authority held that the proposal did not narrow the scope of the discretion the Statute reserved exclusively to EEOC (*ibid.*).

The Authority also rejected EEOC's claim that because the proposal would subject grievances concerning the application of the Circular to the negotiated grievance procedure, the proposal conflicted with the Circular and was thus nonnegotiable (10 F.L.R.A. at 4). The Authority, quoting *AFGE, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C.*, 6 F.L.R.A. 314, 322 (1981), stated that government-wide "regulations * * * may not be applied in a manner inconsistent with the scope of negotiated grievance procedures allowed under Section 7121 of the Statute" (*ibid.*). In this regard, the Authority noted that the Statute and its legislative history require that grievance procedures negotiated under Section 7121 cover all matters that under provisions of law could be submitted to the grievance procedure unless the parties exclude them through bargaining (*ibid.*). Accordingly, the Authority concluded, even assuming that a conflict existed between the proposal and the Circular, the Circular cannot limit "the *statutorily* prescribed

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(TAC), Homestead Air Force Base, Florida, 6 F.L.R.A. 574 (1981), aff'd as to other matters *sub nom. NFFE, Local 1167* v. *FLRA*, 681 F.2d 886 (D.C. Cir. 1982). In that case the proposal would have required the agency to comply with the specific terms of OMB Circular A-76 regardless of whether the Circular were to be revised or rescinded (10 F.L.R.A. at 4). By locking management into observing specific terms in the Circular, the Authority stated in that case, the proposal impermissibly would have imposed its own limitations on management's right (*ibid.*).

scope and coverage of the parties' negotiated grievance procedure" (*ibid.*; emphasis in decision).

Finally, the Authority noted that, to the extent EEOC had argued that the proposal would change the scope and coverage of the parties' negotiated grievance procedure, EEOC had misinterpreted the legal effect of the proposal (10 F.L.R.A. at 5). The Authority stated that even in the absence of the proposed contract provision, under the Statute disputes concerning conditions of employment arising in connection with the application of the Circular would be covered by the negotiated grievance procedure unless a particular grievance is inconsistent with law (see *AFGE, Local 3403 and National Science Foundation, Washington, D.C.*, 6 F.L.R.A. 669, 673 (1981)) or unless the parties exclude such grievances through negotiations (see, *e.g.*, *AFGE, Local 3354 and U.S. Department of Agriculture, Farmers Home Administration, St. Louis, Missouri*, 3 F.L.R.A. 320 (1980)) (*ibid.*).

b. The D.C. Circuit, in an opinion by Judge Tamm (Senior Judge MacKinnon, dissenting), upheld the Authority's decision and enforced the Authority's bargaining order. *EEOC* v. *FLRA*, 744 F.2d 842 (D.C. Cir. 1984). At the outset, the court, citing this Court's decision in *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 97, stated that "the Authority is entitled to 'considerable deference' when interpreting and applying the [Statute's] provisions to specific situations" (744 F.2d at 847).

The court rejected EEOC's argument that the Statute's management rights clause gives management unfettered authority to make contracting-out determinations, and that any bargaining proposal regarding contracting out would restrict that authority (744 F.2d at 848-849). The court found that the

Statute's language plainly requires management to exercise its authority "in accordance with applicable laws" and that Section 7106(b) provides that procedures used to exercise those rights are negotiable (744 F.2d at 848). Accordingly, the court concluded, because the Statute does not grant to management unqualified authority to contract out, management may refuse to bargain over only those proposals that would expand upon the restrictions contained in the Statute (*ibid.*). Since the bargaining proposal did not of itself establish any substantive criteria guiding management's contracting-out determinations, the court agreed with the Authority's conclusion that the proposal did not affect the scope of that authority reserved to management by the Statute (*ibid.*).

Second, the court rejected EEOC's argument that adoption of the proposal would invade management's rights by subjecting management's contracting-out determinations to the negotiated grievance procedure (744 F.2d at 849-851). The court noted that this argument assumes that a complaint asserting that a contracting-out determination was not made in accordance with the Circular would not be grievable in the absence of the contract proposal (744 F.2d at 849). Such an assumption, the court found, was "contrary to the text" of the Statute, which "expansively defines the subjects covered under the [statutorily created negotiated] grievance procedure" (*ibid.*). In this regard, the court noted that under the Statute, "[o]nly five subjects, not including the subject of contracting out, are expressly excluded from coverage under the grievance mechanism" (744 F.2d at 849-850; footnote omitted).[5]

[5] The court also rejected EEOC's argument that all prerogatives reserved to management under the management rights clause are excluded from the scope of grievable matters (744 F.2d at 851). In this connection, the court referred to the legislative history of the Statute which stated that management's reserved right to "remove" employees "would in no way affect the employee's right to appeal the decision * * * through the procedures set forth in a collective bargaining agreement." (744 F.2d at 851 n.20, citing 124 Cong. Rec. 29,183 (1978), *reprinted in Leg. Hist.* 924.)

Finally, the court rejected EEOC's argument that the language of the Circular (that its provisions "shall not be construed to create" any right of appeal except as provided in the Circular itself) renders the proposal nonnegotiable (744 F.2d at 851-852). First, the court noted that the proposal is not inconsistent with the Circular because the proposal does not "create" a new appeal right (744 F.2d at 851). Rather, as the court had already determined, the right to file grievances regarding contracting-out decisions is created by the Statute, not by the proposal (*ibid.*). Second, and "more important[ly]," even if the proposal were inconsistent with the Circular, "[t]here is no indication in the [Statute] or elsewhere of a congressional intent to allow agencies to limit by regulation the statutorily defined grievance procedure" (*ibid.*). The court concluded that to allow the text of the Circular to restrict the scope of grievances would place "limitations in the statute not placed there by Congress" (744 F.2d at 851-852, quoting *Colgate-Palmolive Peet Co.* v. *NLRB*, 338 U.S. 355, 363 (1949)).

c. This Court granted EEOC's petition for a writ of certiorari (472 U.S. 1026 (1985)). After briefing and argument, however, the Court dismissed the writ as improvidently granted. *EEOC* v. *FLRA*, 476 U.S. 19 (1986). The Court found that three of the arguments which were "the linchpins of the EEOC's brief" before the Court (476 U.S. at 23) were not

raised by EEOC before either the Authority or the court of appeals. Specifically, the Court noted EEOC's contention that Circular A-76 is not an "applicable law" under the management rights clause of the Statute (5 U.S.C. 7106), thus making compliance with the Circular an inappropriate intrusion on management's reserved rights (476 U.S. at 22). Second, the Court noted EEOC's assertion that an alleged violation of the Circular would not be grievable absent the proposal because the Circular is not a "law, rule, or regulation" within the meaning of Section 7103(a)(9)'s definition of "grievance" (*ibid*). Third, the Court noted EEOC's suggestion that the Circular *is* a "Government-wide rule or regulation" for purposes of 5 U.S.C. 7117(a)(1), and that Section 7117(a)(1) excludes such rules or regulations from the scope of the duty to bargain (*ibid.*; emphasis in decision).

The Court found that 5 U.S.C. 7123(c) prevented the Court from considering each of these arguments because they were improperly before the Court in the first instance (476 U.S. at 23). Under these circumstances, the Court concluded that several central issues on which resolution of the case may well turn could not be reached or resolved (476 U.S. at 24). Accordingly, the Court dismissed the writ as improvidently granted (*ibid.*).

B. Proceedings in the Present Case

1. The Authority's Decision

This case arose in September 1986 when, in the course of collective bargaining negotiations with the National Treasury Employees Union ("NTEU" or the "union"), the Internal Revenue Service (IRS) objected to three bargaining proposals relating to the contracting-out of bargaining unit work. In response, the union asked the Authority, pursuant to 5 U.S.C. 7117(c), to review the agency's allegation of nonnegotiability concerning two of the proposals to which the agency had objected. The proposal which is the subject of IRS's instant dispute stated as follows (Pet. App. 10a):

> The Internal Appeals Procedure [for agency contracting-out decisions made pursuant to OMB Circular A-76] shall be the parties' grievance and arbitration provisions of the Master Agreements.

The Authority found that the proposal would allow the union to grieve matters arising out of IRS's decisions to contract out, where those matters concern an alleged failure to comply with applicable laws, regulations and established procedural processes (Pet. App. 14a). In assessing the negotiability of this proposal, the Authority first noted that the proposal was not rendered outside the duty to bargain by an inconsistency with a government-wide rule or regulation (Pet. App. 11a-12a). Citing *AFGE, Local 225 and Department of the Army, U.S. Army Armament Research and Development Command, Dover, New Jersey*, 17 F.L.R.A. 417, 420 (1985), the Authority stated that it had previously found OMB Circular A-76 to be a government-wide rule or regulation within the meaning of Section 7117(a)(1) of the Statute (Pet. App. 11a-12a). Further, as to whether the proposal was inconsistent with the Circular, the Authority noted, as it had in *AFGE, AFL-CIO, National Council of EEOC Locals and EEOC*, 10 F.L.R.A. 3 (1982), that the right to file grievances concerning contracting-out decisions which affect conditions of employment is created by the Statute; and that the Circular cannot limit the statutorily prescribed scope and coverage of the par-

ties' negotiated grievance procedure (Pet. App. 12a). Accordingly, the Authority rejected IRS's contention that the proposal was nonnegotiable because it was inconsistent with a government-wide regulation (*ibid.*).

The Authority next examined IRS's three reasons for contending that the proposal was nonnegotiable because the proposal assumes incorrectly that matters pertaining to contracting out under OMB Circular A-76 are subject to the negotiated grievance procedure (Pet. App. 12a-15a). As to IRS's first assertion, that there can be no "grievance" within the meaning of Section 7103(a)(9) of the Statute on a violation, misinterpretation or misapplication of the Circular since the Circular is not a law, rule, or regulation, the Authority responded by noting that the Authority already had found to the contrary. The Authority had previously held that the Circular is a government-wide rule or regulation within the meaning of the Statute, and that grievances concerning its interpretation and application do fall within the statutorily prescribed scope and coverage of the parties' negotiated grievance procedure (Pet. App. 12a-13a).

IRS also claimed that even if OMB Circular A-76 is a government-wide regulation, contracting out does not concern employees' conditions of employment and therefore cannot be a matter which is subject to the grievance procedure (Pet. App. 13a). The Authority rejected this argument, stating that the contracting-out determination has the potential for affecting employees' working conditions even to the extent of costing employees their jobs (*ibid.*). In addition, the Authority stated that the potential loss of employment due to a decision to contract out bargaining unit work, or a decision to reassign or reallocate the duties and functions of bargaining unit positions, at

a minimum, affects the conditions of employment of the employees who perform those duties and functions (*ibid.*).

Finally, as to IRS's contention that the exercise of management's right to contract out cannot be subject to the grievance procedure, the Authority noted that this argument too had been rejected by the Authority in finding a similar proposal negotiable in *EEOC*, 10 F.L.R.A. 3 (Pet. App. 13a). The Authority said that it had concluded that such a proposal itself would not establish any particular substantive limitation on management in the exercise of that right (Pet. App. 13a-14a).

The Authority summarized its negotiability finding by stating that the Statute requires grievance procedures negotiated under Section 7121 of the Statute to cover all matters that under the provisions of law could be submitted to the grievance procedure, unless the parties exclude them through bargaining (Pet. App. 14a). Consequently, the Authority stated, a proposal allowing the union to grieve matters arising from an agency's contracting-out determination on the basis that they are not in compliance with law and regulation would not change the statutorily prescribed scope and coverage of the parties' negotiated grievance procedure. Such disputes, involving conditions of employment arising from the application of OMB Circular A-76, would be covered by the negotiated grievance procedure even in the absence of such a contractual provision (*ibid.*). Moreover, the Authority noted, such grievances require nothing that is not required by Section 7106(a)(2) of the Statute itself, namely, that determinations as to contracting out must be made "in accordance with applicable laws" (Pet. App. 15a). Accordingly, the Authority

found the proposal within the duty to bargain (*ibid.*).

2. The Court of Appeals' Decision in the Instant Case

IRS petitioned the D.C. Circuit to review the Authority's decision. IRS argued generally that any proposal which would subject the IRS's contracting-out decisions under OMB Circular A-76 to arbitral review is nonnegotiable because it would provide for arbitral review of an exercise of a nonnegotiable management right. In addition, IRS advanced two of the three particular arguments which had appeared for the first time in the EEOC brief before this Court in *EEOC* v. *FLRA*, 476 U.S. 19 (1976) (No. 84-1728). Specifically, IRS argued that the proposal was nonnegotiable because OMB Circular A-76 is not a "law, rule, or regulation" within the meaning of 5 U.S.C. 7103(a)(9)(C)(ii), the violation of which gives rise to a grievance; and that OMB Circular A-76 is not an "applicable law[]" that constrains management's contracting-out discretion within the meaning of 5 U.S.C. 7106(a)(2).

The court of appeals (D.H. Ginsburg, J., dissenting) first returned to its holding in *EEOC* v. *FLRA*, 744 F.2d 842 (D.C. Cir. 1984) (Pet. App. 4a). The court noted that in *EEOC* it had found that a grievance alleging noncompliance with the Circular does not affect management's substantive authority, within the meaning of the language of the Statute, to contract out (Pet. App. 5a, quoting *EEOC* v. *FLRA*, 744 F.2d at 850-851). Rather, the court stated, the grievance provides a procedure for enforcing the Statute's requirement that contracting-out decisions be made in accordance with applicable laws (*ibid.*). Accordingly, the D.C. Circuit noted that in *EEOC* it had found that a grievance asserting that management

failed to comply with its statutory or regulatory parameters in making a contracting-out decision is not precluded by the management rights clause (*ibid.*).

After reexamining this holding in *EEOC*, the court below concluded that the *EEOC* court had been assuming that "the Circular was either an 'applicable law,' with which all contracting-out decisions must, by statute, accord, 5 U.S.C. § 7106(a)(2)(B), or it was a 'law, rule or regulation' a failure to comply with which would, again by statute, give rise to a grievance if it were to affect 'conditions of employment.' 5 U.S.C. § 7103(a)(9)(C)(ii)" (Pet. App. 5a). The court below then noted that this Court had dismissed, as improvidently granted, a writ of certiorari, issued upon EEOC's petition when EEOC attempted to argue that the Circular was none of the foregoing (Pet. App. 5a).

These arguments having now been raised in these proceedings, the court below concluded that they do not provide "an intellectually legitimate basis to distinguish *EEOC* from this case" (Pet. 5a). The court below stated that the new arguments "are merely that: they suggest alternative reasons why the 'management rights' provisions of Section 7106 should be read to preclude employee grievances with respect to an agency's decision to contract out" (Pet. App. 5a-6a). This, the court stated, was expressly contrary to the holding of *EEOC* (Pet. App. 6a). Accordingly, the court affirmed the Authority's determination that the proposal is negotiable (Pet. App. 6a).

IRS filed with the court below a petition for rehearing with suggestion for rehearing en banc. On February 28, 1989, both the petition for rehearing and the suggestion for rehearing en banc were denied (Pet. App. 21a-23a). Judge D.H. Ginsburg,

joined by Judges Williams and Sentelle, issued a concurring statement to the effect that, given this Court's apparent interest in this issue (*i.e.*, the Court's willingness to grant certiorari in *EEOC* v. *FLRA*, 472 U.S. 1026 (1985), at a time when there was no split in the circuits), it was not a sensible allocation of the resources of the court below to rehear the case en banc (Pet. App. 25a). The statement indicated that if this Court chose not to grant a new petition for a writ of certiorari, the judges were expressing no opinion as to whether they would be willing to grant rehearing in a subsequent case before the D.C. Circuit (*ibid.*). Judge Silberman also issued a short concurrence in which he stated that the court should be exceedingly reluctant to agree to an en banc rehearing with the then-existing two vacancies on the bench (Pet. App. 24a).

SUMMARY OF ARGUMENT

The Federal Service Labor-Management Relations Statute allows every collective bargaining agreement to have a negotiated grievance procedure which will resolve alleged violations of "law, rule, or regulation affecting conditions of employment." OMB Circular A-76 is such a "law, rule, or regulation" within the meaning of the Statute. 5 U.S.C. 7103(a)(9), 7121(a). The bargaining proposal at issue in this case is negotiable because, in specifying that the parties' grievance procedure will cover alleged violations of the Circular and its Supplement, it provides negotiated grievance procedure coverage within the parameters that Congress has expressly authorized. The Authority's holding, enforced by the court of appeals, warrants affirmance by this Court.

A.1. Unlike the National Labor Relations Act in the private sector, the Statute prescribes various sub-

stantive terms of the collective bargaining relationship for the federal service. Thus, while the Statute insulates management discretion in certain areas from being narrowed at the bargaining table, the Statute also requires the parties to have a negotiated grievance procedure which is authorized to resolve alleged violations of "law, rule, or regulation affecting conditions of employment." 5 U.S.C. 7121 in conjunction with 5 U.S.C. 7103(a)(9). Congress intended this "broad scope" grievance procedure to be the standard contractual arrangement. See H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 157 (1978); *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d 640, 649 (D.C. Cir. 1983).

2. Congress did not intend the limitations the Statute places on the scope of bargaining also to limit the scope of the negotiated grievance procedure. This is borne out by the language, legislative history, and structure of the Statute. The language of the Statute underscores the fact that, even though nonbargainable, management's discretion to contract out is to be exercised within the parameters of applicable legal requirements and is subject to the obligation to bargain over procedures and appropriate arrangements. The legislative history emphasizes that management's exercise of its nonbargainable discretion does not prevent management's decision from being reviewed for compliance with law, rule, or regulation through the negotiated grievance procedure. Finally, the structure of the Statute confirms that when Congress wanted to make certain management authority nongrievable, Congress did not rely on the fact that the Statute already made that same management authority nonbargainable. Compare 5 U.S.C. 7106(a)(2)(A) with 5 U.S.C. 7121(c). Instead, Congress specified exclusions from the scope of the negotiated

grievance procedure, none of which concerns contracting out.

3. As a result, the Statute has consistently been construed as authorizing grievances over whether the exercise of management's nonbargainable authority was consistent with the requirements of "law, rule, or regulation affecting conditions of employment." However, to say that Section 7106 does not narrow the scope of the Section 7121 grievance procedure is not to say that Section 7106 plays no role in the resolution of grievances. Arbitrators are authorized to consider only grievances challenging a decision to contract out on the basis that the agency failed to comply with mandatory and nondiscretionary provisions of the Circular and its Supplement. If there is a proper finding that the agency's failure to comply with such mandatory provisions materially affected the final procurement decision, the arbitrator is not authorized to cancel a procurement action. Instead, the Authority requires arbitrators to leave with the agency the determination of whether considerations of cost, performance, and disruption override cancelling the procurement action. In short, arbitral review operates as the congressionally authorized check against management authority which has exceeded the constraints of law, rule, or regulation, while preserving for management the discretion which the Statute reserves as nonbargainable.

B. OMB Circular A-76 is a "law, rule, or regulation affecting conditions of employment" within the meaning of Section 7103(a)(9)(C)(ii) of the Statute, such that grievances concerning its alleged violation fall within the statutorily authorized scope of the negotiated grievance procedure. IRS does not argue, and indeed has conceded, that the Circular affects conditions of employment. With respect to the Statute's use of the term "rule, or regulation," the Conference Committee Report stated that the "conferees specifically intend" that the term "rules or regulations," as used in Section 7117(a) and Section 7117(d) of the Statute, "be interpreted as including official declarations of policy of an agency which are binding on officials and agencies to which they apply." H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 158-159 (1978). IRS has conceded that the Circular is a rule or regulation within the meaning of Section 7117(a) and 7117(d) of the Statute.

In the absence of any indication that Congress intended a different meaning for the term "rule, or regulation" in Section 7103(a)(9)(C)(ii), it is reasonable to conclude that Congress intended the term to have the same meaning as Congress intended the term to have in Sections 7117(a) and 7117(d) of the Statute. Hence, the Authority properly found that the Circular is a "rule or regulation" within the definition Congress used for establishing the permissible scope of the negotiated grievance procedure. Moreover, given that the Circular was published for notice and comment in the Federal Register, that it requires agencies to conform to procedures specific enough to allow the Comptroller General to review an agency's compliance, and that it provides for an appeals procedure in which employees may challenge an agency's compliance, it is difficult to conceive of the Circular as being other than a "rule or regulation." Accordingly, the Authority has correctly determined that the union's proposal, which specifies that the negotiated grievance procedure will be available to resolve allegations that the agency has failed to comply with the mandatory provisions of the Circular and its Supplement, is negotiable.

ARGUMENT

THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE AUTHORIZES NEGOTIATED GRIEVANCE PROCEDURES IN COLLECTIVE BARGAINING AGREEMENTS TO INCLUDE GRIEVANCES OVER WHETHER MANAGEMENT VIOLATED OMB CIRCULAR A-76 WHEN MAKING DETERMINATIONS TO CONTRACT OUT BARGAINING UNIT EMPLOYEES' JOBS

The bargaining proposal which IRS alleges to be nonnegotiable in this case serves the purpose of identifying, in the area of contracting out, the scope of the parties' negotiated grievance procedure. The proposal stipulates that the negotiated grievance procedure will cover disputes over whether IRS violated OMB Circular A-76 in making any determinations to contract out bargaining unit employees' jobs. The proposal is negotiable because, as we demonstrate below, the terms of the Statute clearly sanction the submission of such disputes to arbitral review for the limited purpose of reviewing compliance with the mandatory provisions of the Circular.[6]

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[6] IRS argues (Pet. Br. at 23) that if the Statute already sanctions the right to grieve violations of OMB Circular A-76, then the bargaining proposal is superfluous. Being superfluous does not render a proposal nonnegotiable; if anything, it underscores why the proposal properly can be included in a collective bargaining agreement. In federal sector labor-management relations, it is accepted practice to reference already-existing statutory and regulatory requirements in the parties' collective bargaining agreement. This practice permits the bargaining agreement to serve as a self-contained reference for supervisors, union representatives, and employees. See *Montana Air National Guard* v. *FLRA*, 730 F.2d 577, 579 (9th Cir. 1984) (even if an exclusion from scope of parties' negotiated grievance procedures would exist by operation of law, employing agency is within its rights to insist upon express reference to such exclusion in collective bargaining agreement); see also *Department of the Army, U.S. Army Aberdeen Proving Ground Installation Support Activity* v. *FLRA*, Nos. 88-1895 et al. (D.C. Cir. Dec. 1, 1989) slip op. 20 n.12. In the instant case, this practice also serves to preclude a later challenge to the arbitrability of this matter and thus, at the time the parties seek to use the grievance procedure, avoids delay. See *AFGE, Local 1513 and Naval Air Station, Whidbey Island*, 26 F.L.R.A. 289 (1987) (arbitrator ruled that grievance was not arbitrable because collective bargaining agreement did not contain an agreement to comply with OMB Circular A-76; FLRA set aside award).

A. The Statute Authorizes The Negotiated Grievance Procedure To Resolve Claims That Management Violated A Law, Rule, Or Regulation Affecting Conditions Of Employment When It Exercised A Reserved Management Right

In the Civil Service Reform Act of 1978, of which the Statute is Title VII, Congress sought to further twin purposes: to preserve the ability of federal managers to maintain an effective and efficient government; and to strengthen the position of federal unions and make the collective bargaining process a more effective instrument of the public interest. See *Cornelius* v. *Nutt*, 472 U.S. 648, 650-652 (1985).[7] As the House Committee Report noted, one of the specific goals of the CSRA was to "ensure adequate protection for employees against unlawful abuse by agency management." H.R. Rep. No. 1403, 95th Cong. 2d Sess. 3 (1978), *reprinted in Leg. Hist.* 679.

To further these purposes in the area of labor-management relations, and unlike the National Labor Relations Act in the private sector, the Statute establishes with specificity certain substantive aspects of the parties' collective bargaining relationship. Thus, the Statute reserves certain matters to agency man-

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[7] IRS's reliance on *Cornelius* (Pet. Br. at 22, 39) conspicuously ignores the second of the two CSRA purposes articulated in *Cornelius*.

agement discretion, subject to the obligation to bargain over procedures and appropriate arrangements. 5 U.S.C. 7106. The Statute also singles out negotiated grievance procedures for special attention. 5 U.S.C. 7121.

1. Congress Specifically Intended To Authorize A "Broad Scope" Negotiated Grievance Procedure

Every collective bargaining agreement must contain a negotiated grievance procedure with binding arbitration as the final step. 5 U.S.C. 7121. Moreover, as this Court has recognized, the Statute "broadly defines 'grievance'." *Cornelius* v. *Nutt*, 472 U.S. at 664. Congress specified that the term grievance includes, among other things, any complaint by any employee concerning "any matter relating to the employment of the employee (Section 7103(a)(9)(A)), or "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment * * *" (Section 7103(a)(9)(C)(ii)).

Congress also specified that the parties may, by agreement, remove matters of their own choosing from coverage under the negotiated grievance procedure. 5 U.S.C. 7121(a)(2). Thus, while Congress intended the "broad scope" grievance procedure to be the standard contractual arrangement, *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d 640, 649 (D.C. Cir. 1983), the parties are free to agree otherwise. As stated in the Conference Committee Report: "All matters that under the provisions of law could be submitted to the grievance procedure shall in fact be within the scope of any grievance procedure negotiated by the parties unless the parties agree as part of the collective bargaining process that certain matters shall not be covered by the grievance procedures."

H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 157 (1978), *reprinted in Leg. Hist.* 825.

Finally, in Section 7121(c) of the Statute, Congress specified the following mandatory exclusions from the scope of the negotiated grievance procedure: alleged violations of proscriptions on political activity; disputes relating to retirement, life insurance, and health insurance; suspension or removal of employees on grounds of national security; examination for, or certification or appointment to, positions; and reduction in rank. 5 U.S.C. 7121(c). Thus, as the House Committee Report stated, "although [subsection 7103(a)(9)] is virtually all-inclusive in defining 'grievance,' section 7121 excludes certain grievances from being processed under a negotiated grievance procedure, thereby limiting the net effect of the term." H.R. Rep. No. 1403, 95th Cong., 2d Sess. 40 (1978), *reprinted in Leg. Hist.* 686.[8]

Contracting-out determinations are not among those matters which Section 7121(c) excludes from the scope of negotiated grievance procedures. Consequently, the standard broad scope negotiated grievance procedure under the Statute allows grievances based upon claims that management violated, misinterpreted, or misapplied any law, rule or regulation affecting conditions of employment when it made a specific determination to contract out certain bargaining unit work. The union's proposal merely seeks to identify the reach of the negotiated grievance procedure within the permissible parameters of such a broad scope grievance procedure.

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[8] See also *Andrade* v. *Lauer*, 729 F.2d 1475, 1487 n.22 (D.C. Cir. 1984) ("Congress demonstrated its care in defining the scope of the negotiated grievance procedures by defining several types of claims that it intended to keep outside the scope of the grievance procedure. *See* 5 U.S.C. § 7121(c) (1982).").

2. Congress Did Not Intend The Section 7106 Limitations On Bargaining To Limit The Permissible Scope Of The Section 7121 Grievance Procedure

IRS ignores the statutorily prescribed scope of the negotiated grievance procedure and argues instead from the Statute's management rights provision, 5 U.S.C. 7106. The major premise of IRS's argument (Pet. Br. at 22-23, 29, 30-31, 35-36) is the assertion that the Statute's designation of a matter in Section 7106 as a reserved management right precludes the negotiated grievance procedure from resolving grievances over whether management exercised that right within legal and regulatory requirements.[9] In particular, IRS uses (Pet. Br. at 21, 29, 35-36) Section 7106's phrase "nothing in this chapter shall affect" management's authority to exercise a reserved right as the textual support for this assertion. IRS's premise is in error and its reliance on "nothing in this chapter" incorrectly reads that phrase in isolation from the remainder of Section 7106; in isolation from the legislative history of the Statute; and in isolation from the structure of the Statute.

a. Section 7106 states in relevant part: "Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of [management] * * * in accordance with applicable laws * * * to make determinations with respect to contracting out[.]" 5 U.S.C. 7106. The language of Section 7106 does not purport to totally unfetter management's authority. First, the accepted understanding that management must exercise its authority in accordance with ap-

[9] But see Pet. Br. at 37-38, where IRS would appear to concede that the negotiated grievance procedure can resolve grievances over whether management violated "law, rule, or regulation affecting conditions of employment" when it exercised its reserved management right.

plicable legal and regulatory requirements is not merely self-evident,[10] the plain language of the Statute states that management is reserved the authority "in accordance with applicable laws * * * to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B).[11] See *NFFE, Local 1745* v. *FLRA*, 828 F.2d 834, 839 n.30 (D.C. Cir. 1987) ("Of course, as with all management prerogatives

[10] Under general labor law principles, the designation of a matter as a reserved management right does not exempt management's exercise of that right from restrictions imposed by applicable law and regulations. See, *e.g.*, Prasow & Peters, *Arbitration and Collective Bargaining* 31 (1970) ("Stated in an unqualified simplistic form, the reserved-rights theory holds that management's authority is supreme * * * in all areas except those where its authority is restricted by law." [footnote omitted]); Rabin, *Fibreboard and the Termination of Bargaining Unit Work: the Search for Standards in Defining the Scope of the Duty to Bargain*, 71 Colum. L. Rev. 803, 814 (1971) ("The 'management rights doctrine' is a valid rule of construction which holds that management is presumed to retain its unfettered common law right to run its business except as abridged by contract or statute."); Phelps, "Management's Reserved Rights: An Industry View," in *Proceedings of Ninth Annual Meeting of National Academy of Arbitrators*, 102, 105 (1956) ("In the absence of [a collective bargaining agreement narrowing management's reserved rights], management has absolute discretion in the hiring, firing, and the organization and direction of the working forces, subject only to such limitations as may be imposed by law.").

[11] See Elkouri and Elkouri, *How Arbitration Works*, 4th ed., 58-59 (1985) ("The statutory words 'in accordance with applicable laws' do limit management rights, and this limitation would appear to be properly enforceable by contractual grievance and arbitration procedures. Apart from this, however, the statutory reservation of management rights necessarily reduces the scope of grievance-procedure or arbitral authority to disturb actions taken by agency management officials.").

mentioned in § 7106(a)(2), the right to select for appointment is constrained by the condition that it be exercised 'in accordance with applicable laws,' as obviously it must be even without written words to that effect.").

Second, Section 7106(a) of the Statute makes this management authority "[s]ubject to" Section 7106 (b)(2) and (3), which provides for the negotiation of procedures which management will observe in exercising its right to contract out and "appropriate arrangements" for employees adversely affected by the exercise of the right. 5 U.S.C. 7106(b)(2) and (b)(3). See, *e.g.*, *AFGE, Local 2782* v. *FLRA*, 702 F.2d 1183, 1185 (D.C. Cir. 1983); *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1146 and n.28, 1151, 1153 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982). Consequently, the indiscriminate sweep IRS would attribute to Section 7106 ignores the fact that management's authority is to be exercised within the parameters of applicable legal requirements and is subject to the obligation to bargain over procedures and appropriate arrangements.

b. IRS's reading also ignores the legislative history accompanying Section 7106 which shows that Section 7106 was not intended as a limitation on, or modification of, the statutorily prescribed reach of the negotiated grievance procedure. The last changes made by Congress to the terms of Section 7106 were contained in Congressman Udall's substitute amendment.[12] As he introduced his substitute on the House floor, Congressman Udall stated with respect to Section 7106: "[This amendment] preserves management's right to make the final decisions * * * *in accordance with applicable laws, including other provisions of* [*the Statute*]. For example, management has the reserved right to make the final decision to 'remove' an employee, but that decision * * * would in no way affect the employee's right to appeal the decision through * * * the procedures set forth in a collective bargaining agreement." 124 Cong. Rec. 29,183 (1978) (emphasis added), *reprinted in Leg. Hist.* 924.

In addition, Congressman Ford stated: "[S]o long as a rule or regulation 'affects conditions of employment', infractions of that rule or regulation are fully grievable even if the rule or regulation implicates some management right. This interpretation of [Section 7103(a)(9)]is required by both the express language of [Section 7103(a)(9)] and by the greater priority given the negotiability of procedures over the right of management to bar negotiations because of a retained management right." 124 Cong. Rec. 38,717 (1978), *reprinted in Leg. Hist.* 998. Thus, the Statute's legislative history confirms that Section 7106 was not intended to preclude grievances over whether management exercised its reserved authority in accordance with law, rule, or regulation.[13]

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[12] 124 Cong. Rec. 29,176, 29,221 (1978), *reprinted in Leg. Hist.* 911, 966. See *Department of Defense* v. *FLRA*, 659 F.2d at 1156.

[13] IRS lacks any support in the Statute's legislative history for a contrary view of the reach of the negotiated grievance procedure.

Further, with respect to IRS's contention that the Statute's management rights provision is sufficiently broad to dispose of the issue in this case, IRS's attempt to find support for this view from Congressmen Clay and Ford (Pet. Br. at 21-22) is completely unavailing. See 124 Cong. Rec. 29,187 (1978) (statement of Rep. Clay) ("the management rights clause is to be construed as a narrow exception to the general obligation to bargain in good faith"), *reprinted in Leg. Hist.* 932; 124 Cong. Rec. 29,199 (1978) (statement of Rep. Ford) ("It is our expectation and that of others supporting the substitute's management rights clause that such a clause will ade-

c. Finally, the structure of the Statute demonstrates that designation of a matter as a management right in Section 7106 does not bar grievances over whether management exercised that right within legal and regulatory requirements. The authority to take discipline is reserved to management as nonnegotiable by Section 7106(a)(2)(A) of the Statute. By making discipline a reserved management right, Congress did not also make discipline nongrievable. *E.g.*, *Cornelius* v. *Nutt*, 472 U.S. at 652. When Congress wanted to make an aspect of management's disciplinary authority nongrievable, Congress knew how to do so. Congress crafted an exception in Section 7121(c) to the permissible scope of a negotiated grievance procedure. Thus, for example, Section 7121(c)(3) removes from the scope of the negotiated grievance procedure any grievances concerning an employee's suspension or removal taken for national security reasons. Congress also could have removed from the scope of the negotiated grievance procedure all grievances concerning contracting out, but it did not. Cf. *Gray* v. *Office of Personnel Management*, 771 F.2d 1504, 1511 (D.C. Cir. 1985), cert. denied, 475 U.S. 1089 (1986) ("We can not and will not * * * add a statutory provision which the First Branch did not include.").

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quately protect genuine managerial prerogatives but that, construed strictly, such a clause will also allow the flexibility that is the hallmark of a successful labor-management program. Thus, although management has the right to direct the workforce, proposals aimed at lessening the adverse impact on employees of an exercise, perhaps arbitrary, of that right are fully negotiable."), *reprinted in Leg. Hist.* 956. See also H.R. Rep. No. 1403, 95th Cong., 2d Sess. 43-44 (1978), *reprinted in Leg. Hist.* 689-690.

3. The Statute Has Consistently Been Construed As Authorizing Grievances That Management's Exercise Of A Section 7106 Reserved Right Was Not In Accordance With The Mandatory Provisions Of "Law, Rule, Or Regulation Affecting Conditions Of Employment," While Restricting The Scope Of Appropriate Remedies Where Such Grievances Are Sustained

Because of the language, legislative history, and structure of the Statute, it is well settled in the federal sector labor-management relations program that grievance arbitration can resolve a claim that management violated a law, rule, or regulation affecting conditions of employment when it exercised a reserved management right. Thus, a grievance lies to challenge management's compliance with applicable reduction-in-force rules and regulations even though the authority to layoff employees is made nonnegotiable by Section 7106(a)(2). See *Andrade* v. *Lauer*, 729 F.2d at 1484-1489 (D.C. Cir. 1984). A grievance lies to challenge management's alleged noncompliance with applicable laws and regulations affecting conditions of employment even where the subject matter of the grievance involves management's right to determine its organization under Section 7106(a)(1). *General Services Administration and AFGE, National Council 236*, 27 F.L.R.A. 3, 8 (1987). See also 124 Cong. Rec. 29,183 (1978) (remarks of Cong. Udall), *reprinted in Leg. Hist.* 924 and *Cornelius* v. *Nutt*, 472 U.S. 648, 652 (1985) (grievances over management's nonnegotiable right to discipline); *United States Marshals Service* v. *FLRA*, 708 F.2d 1417, 1419, 1421 n.5 (9th Cir. 1983) (grievance which agency alleged involved nonnegotiable Section 7106(b)(1) right to determine tours of duty).[14]

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[14] Because the Statute authorizes grievances over the exercise of a management right based upon alleged violations of

However, to say that Section 7106 does not preclude grievances over the exercise of reserved management rights is not to say that Section 7106 plays no role in the resolution of such grievances. The proper phase of grievance arbitration in which to determine the impact of Section 7106 is not at the outset so as to preclude an arbitrator by law from having jurisdiction over a matter. See *AFSCME Local 3097 and Department of Justice, Justice Management Division*, 31 F.L.R.A. 322, 331 (1988). Rather, the determination as to the impact or application of Section 7106 is to be made in connection

"law, rule, or regulation affecting conditions of employment" and because, as we show at pages 34-45, *infra*, the Circular is such a "law, rule, or regulation," the negotiability of the instant proposal is fully resolved without the necessity of determining if the Circular is an "applicable law" as referred to in Section 7106(a)(2). See *AFSCME Local 3097 and Department of Justice, Justice Management Division*, 31 F.L.R.A. 322, 339 (1988). We note that IRS has not even asserted that the phrase "applicable laws" in Section 7106(a)(2) excludes rules and regulations as a limitation on the exercise of its reserved management rights. Rather, IRS's negotiating position in this case tacitly recognizes just the opposite. Thus, IRS (in response to another union bargaining proposal that stated: "The IRS agrees to comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out" (C.A. App. 11)), counter-proposed the following:

1. The Service agrees to comply with any applicable laws *or regulations* concerning contracting out. However, the inclusion of this language in the agreement shall not create any *additional* limitations on management's authority or right to make determinations on contracting out.
2. Arbitrators are without authority to order cancellation of a procurement action or to review an agency decision in the procurement process concerning a matter of agency judgment or discretion.

C.A. App. 13 (emphases added), see C.A. App. 9.

with the arbitrator's consideration of the substantive issue presented by the grievance and any possible remedy. *Ibid.*

In the area of contracting out, Authority case law ensures that the full range of management's discretion in making contracting-out determinations will be preserved in the arbitral review process.[15] Arbitrators "are authorized to consider only grievances challenging a decision to contract out on the basis that the agency failed to comply with mandatory and nondiscretionary provisions of applicable procurement law or regulation. These provisions must be sufficiently specific to permit the arbitrator to adjudicate whether there has been compliance with such provisions." *Headquarters, 97th Combat Support Group (SAC, Blytheville Air Force Base, Arkansas and AFGE, Local 2840*, 22 F.L.R.A. 656, 661 (1986) (*Blytheville*). If an arbitrator sustains such a grievance, "the arbitrator as a remedy may properly order a reconstruction of the procurement action when the arbitrator finds that an agency's noncompliance materially affected the final procurement decision and harmed unit employees." *Id.* at 661-662.

The arbitrator is "not authorized to cancel a procurement action." *Id.* at 661. Instead, if the decision to contract out can no longer be justified after the

[15] Congress empowered the Authority to resolve exceptions to arbitral awards to ensure that such awards are not contrary to any law, rule, or regulation. 5 U.S.C. 7122(a)(1). The Authority's responsibility to ensure that arbitrators' awards to which exceptions are taken conform to applicable legal requirements exemplifies Congress's effort "to establish procedures which are designed to meet the special requirements and needs of the Government." 5 U.S.C. 7101(b).

agency completes a reconstruction of the procurement action, "the agency must determine whether considerations of cost, performance, and disruption override cancelling the procurement action and take whatever action is appropriate on the basis of that determination." *Id.* at 662. For example, the Authority stated, "an agency could determine that immediate cancellation is warranted, or an agency could determine that cancellation is not warranted, but that an improperly granted contract should not be renewed." *Id.* at 662.

Consequently, given that arbitrators are only allowed to review agency compliance with the mandatory aspects of applicable law and regulation, arbitral review does not reduce the discretion legally available to management in the exercise of this Section 7106 management right. Furthermore, even in those cases where management is found to have violated a mandatory aspect of law or regulation, the Authority limits arbitral remedies to those which will leave to management the discretion to chart, in accordance with applicable law and regulation, its course of action with respect to contracting out.

Thus, arbitral review of management's contracting-out determinations imposes no additional substantive limitations on the exercise of that reserved right. Instead, and as Congress intended, it operates as a check against that exercise of management authority which has exceeded the constraints of law, rule, or regulation. As a result, none of the cases in which the Authority has resolved exceptions to arbitral awards involving agency contracting-out determinations bears out IRS's totally unsupported assertion (Pet. Br. at 29-31) that the arbitral review proc-

ess intrudes into areas of discretionary agency decisionmaking.[18]

Contrary to IRS's assertion (Pet. Br. at 31-35), arbitral review also imposes no delay on the exercise of management's contracting-out authority. If it did, the court below would have found the instant proposal nonnegotiable just as it found nonnegotiable another proposal in this case below which did impose delay. See Pet. App. 7a (proposal held nonnegotiable because it stayed management from making a contracting-out award until a grievance is processed up to and including arbitration). Additionally, the Authority's *Blytheville* decision, which prohibits an arbitrator from cancelling a procurement action, reassures agency management that any decision to proceed to contract out will not be rescinded by virtue of being subject to subsequent arbitral review. Accordingly, arbitral review, as authorized by the Statute and as overseen by the Authority, simply does not impose delay on the exercise of management's contracting-out authority.

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[18] *Health Care Financing Administration and AFGE, Local 1923*, 30 F.L.R.A. 1282, reconsideration denied, 32 F.L.R.A. 250 (1988); *National Center for Toxicological Research and AFGE, Local 3393*, 27 F.L.R.A. 40 (1987); *U.S. Army Engineer District, St. Louis and AFGE, Local No. 3838*, 26 F.L.R.A. 398 (1987); *Department of the Army, Oakland Army Base and AFGE, Local 1157*, 23 F.L.R.A. 199 (1986); *United States Army Communications Command, Fort McClellan and Local No. 1941, AFGE*, 23 F.L.R.A. 184 (1986); *United States Army Communications Command Agency, Redstone Arsenal and AFGE, Local 1858*, 23 F.L.R.A. 179 (1986); *Congressional Research Employees Association and The Library of Congress*, 23 F.L.R.A. 137 (1986); *Naval Air Station, Whiting Field and AFGE, Local Union No. 1954*, 22 F.L.R.A. 1059 (1986); *Blytheville*, 22 F.L.R.A. 656 (1986).

B. Circular A-76 Is A "Law, Rule, Or Regulation" Within The Meaning Of The Statute

OMB Circular A-76 with its Supplement is a "law, rule, or regulation affecting conditions of employment" within the meaning of Section 7103(a)(9)(C)(ii) of the Statute, such that grievances concerning its alleged violation fall within the statutorily authorized scope of the negotiated grievance procedures. The Circular's status as a rule or regulation within the meaning of Section 7103(a)(9)(C)(ii) comports with the Authority's earlier finding, accepted as correct by IRS in the court below (IRS C.A. Br. at 27 n.20), that the Circular is a "Government-wide rule or regulation" within the meaning of Section 7117(a)(1) of the Statute.[17] It also comports with IRS's acknowledgement in the court below (IRS C.A. Reply Br. at 10 n.5) that the Circular is a "Government-wide rule or regulation issued by [OMB] effecting [a] substantive change in [a] condition of employment" within the meaning of Section 7117(d) of the Statute.[18]

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[17] See *AFGE, Local 225 and Department of the Army, U.S. Army Armament Research and Development Command, Dover, New Jersey*, 17 F.L.R.A. 417, 419-421 (1985).

[18] While IRS contends that the Circular is not a "law, rule, or regulation affecting conditions of employment" within the meaning of Section 7103(a)(9)(C)(ii) of the Statute, IRS cannot be heard to argue that the Circular is outside this definition because the Circular does not "affect conditions of employment." IRS did not raise this argument in the court below and thus is barred from doing so in this Court by 5 U.S.C. 7123(c). See *EEOC* v. *FLRA*, 476 U.S. 19, 23 (1986). Not only did IRS fail to raise this argument in the court below but, to the contrary, IRS explicitly recognized that the Circular affected conditions of employment within the meaning of Section 7117(d) of the Statute. Section 7117(d)(1) of the Statute requires, with respect to "any Government-wide rule or regulation issued by [an] agency effecting any substantive change in any condition of employment," that the agency which promulgates such a regulation must afford federal sector unions "national consultation rights." 5 U.S.C. 7117(d)(1). As acknowledged by IRS below (IRS C.A. Reply Br. at 10 n.5), the Office of Management and Budget was required to, and did, extend national consultation rights with respect to OMB Circular A-76 pursuant to Section 7117(d) of the Statute. Moreover, the Circular states that federal employees are among those directly affected by the Circular. Para. 6(g), 48 Fed. Reg. 37,114 (1983), and Supplement at I-15, *reprinted in* Pet. Br. App. 13a.

The Statute does not define the term "rule" or "regulation," but the Conference Committee Report stated that the "conferees specifically intend" that the term "rules or regulations," as used in Section 7117(a) and Section 7117(d) of the Statute, "be interpreted as including official declarations of policy of an agency which are binding on officials and agencies to which they apply." H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 158-159 (1978), *reprinted in Leg. Hist.* 826-827. There is nothing in the Statute or its legislative history to suggest that Congress intended a different meaning for the term "rule, or regulation" as used in Section 7103(a)(9)(C)(ii) from the meaning Congress intended for that term in Sections 7117(a) and 7117(d) of the Statute. In the absence of any such indication, it is reasonable to conclude that Congress intended the same terms to have the same meaning in the same statute. See, *e.g.*, *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986); *Finnegan* v. *Leu*, 456 U.S. 431, 438 & n.9 (1982).

As we now proceed to show, and as IRS acknowledged in the court below (IRS C.A. Br. at 27 n.20; IRS C.A. Reply Br. at 10 n.5), OMB Circular A-76 and its Supplement meet this definition of "rule, or

regulation." Given that the Circular was published for notice and comment in the Federal Register, that it requires agencies to conform to specific procedures, and that it provides for an appeals procedure in which employees may challenge an agency's compliance with various aspects of the Circular and its Supplement except for "Government management decisions" (Supplement at I-14, *reprinted in* Pet. Br. App. 12a), it is difficult to conceive of the Circular as being other than a "rule, or regulation." [19]

1. In 1983, OMB promulgated the most recent version of the Circular after notice and comment in the Federal Register (48 Fed. Reg. 1376 (1983); 48 Fed. Reg. 37,113 (1983)). Revisions that were made in 1985 to the Circular's Supplement [20] also were promulgated after notice and comment in the Federal Register (50 Fed. Reg. 32,812 (1985)). And in 1989, it is clear that the OMB continues to view proposed changes to the Circular or its Supplement as regulatory changes. Thus, the Regulatory Flexibility Act (5 U.S.C. 602) and Executive Order 12,291 (46 Fed. Reg. 13,193 (1981))—both of which are administered by OMB—require that agencies publish semiannual regulatory agendas describing regulatory actions they are developing. In the April 1989 publication of this "Unified Agenda of Federal Regulations," the OMB itself included changes to Part II of the Supplement to OMB Circular A-76 in its listing of proposed regulatory actions (54 Fed. Reg. 16,440, 17,396 (1989)).

[19] With these attributes, it is clear that the regulatory character of the Circular and its Supplement contrast sharply with the intra-office procedural guidance to employees contained in the claims manual in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), which IRS uses (Pet. Br. at 38) as the one example to support its assertion that the Circular is not a rule or regulation. See Rubin, *Due Process and the Administrative State*, 72 Calif. L. Rev. 1044, 1109 n.309 (1984).

[20] The explicit directions with respect to contracting out are largely contained in the Supplement, on page (i) of which it states that the Supplement "is an integral part of the Circular, and compliance with all parts of the Supplement is mandatory." IRS has lodged with the Court copies of the 1983 Supplement and copies of the eight revisions that have been made to the Supplement since then.

The Circular was promulgated, as its paragraph 3 states (48 Fed. Reg. 37,114 (1983)), under the authority of the Budget and Accounting Act of 1921 (31 U.S.C. 1 *et seq.*) and the Office of the Federal Procurement Policy Act of 1979 (41 U.S.C. 401 *et seq.*). The purpose of the Circular is to establish, as its paragraph 1 states (48 Fed. Reg. 37,114 (1983)), federal policy regarding the performance of commercial activities. Paragraph 7 of the Circular provides that "[u]nless otherwise provided by law, the Circular and its Supplement shall apply to all executive agencies and shall provide administrative direction to heads of agencies" (*ibid.*). An agency is obligated to comply with the Circular because, quite simply, the Circular by its own terms requires compliance (para. 9, 48 Fed. Reg. 37,115 (1983)).

The Circular provides that if private performance of a function is permissible, a comparison of the cost of contracting out and the cost of in-house performance shall be conducted, as specifically prescribed by the Circular and its Supplement, to determine who will do the work (para. 5(a), 48 Fed. Reg. 37,114 (1983)). As a general rule, government performance is authorized only if a cost comparison demonstrates that the government is operating, or can operate, the activity at a lower estimated cost than by contract (para. 8(d), 48 Fed. Reg. 37,115 (1983)).

2. The terms of the Circular and its Supplement clearly disprove IRS's contention that agencies have unlimited leeway in conducting cost comparisons or in otherwise contracting for services covered by it. Much of the Circular contains specific methodology for quantifying, measuring, or otherwise accounting for the employer's costs in performing a function, which, correctly applied, will yield only one result and will determine whether the function is to be performed by private contractors or in-house.

The Supplement contains four Parts. Part IV, for example, is the seventy-odd page Cost Comparison Handbook which "provides detailed instructions for developing a comprehensive comparison of the estimated cost" of in-house versus contract performance, and the procedures "are intended to establish a practical level of consistency and uniformity to assure all substantive factors are considered when making cost comparisons." Supplement at IV-1.[21] To assure that fair and equitable comparisons are achieved, the Handbook provides line-by-line instructions for completing a series of worksheets (personnel, material and supply costs, depreciation, insurance, overhead, etc.), culminating in completion of a cost comparison form, the "bottom line" of which dictates whether the activity will be performed by contract or in-house by federal employees. *Id.* at IV-45 to IV-46. The Handbook requires "document[ation] to provide a record of information to support each line of the cost study." *Id.* at IV-6.

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[21] For example, the Circular and its Supplement specify figures to be used in the cost comparison process, ranging from fringe benefits for federal employees (see, for example, 50 Fed. Reg. 32,812 (1985)) to the useful life to be attached to various classes of equipment (Supplement at IV-20, IV-55).

IRS contends that, because some courts have found alleged violations of the Circular not to be justiciable,[22] the Circular should not be deemed a rule or

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[22] But see *CC Distributors, Inc.* v. *United States*, 883 F.2d 146, 155 (D.C. Cir. 1989) where the D.C. Circuit concluded that language nearly identical to the Circular's paragraph 6(e) gives courts sufficient guidance to undertake review of the Air Force's contracting-out determination.

IRS cites (Pet. Br. at 27) *AFGE, Local 2017* v. *Brown*, 680 F.2d 722, 726 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983) for its comment that "[a]ll of the courts which have considered the issue have held that [contracting-out decisions] under Circular A-76 are committed to agency discretion and are not subject to judicial review." A reading of *Brown* reveals that all the decisions to which *Brown* refers considered the pre-1979 version of the Circular, which contained a provision stating that "[n]o specific standard or guideline is prescribed for deciding whether savings are sufficient to justify continuation of an existing Government commercial activity and each activity should be evaluated on the basis of the applicable circumstances." Circular A-76, para. 7c(3) (Revised 1967), quoted in *Local 2855, AFGE* v. *United States*, 602 F.2d 574, 581 (3d Cir. 1979). Thus, for example, the Third Circuit in the *Local 2855, AFGE* decision concluded that because the Circular "appear[s] to be primarily a loose managerial tool for implementing the government's stated policy of relying whenever possible on private concerns to supply its needs," it cannot appropriately be seen as "creat-[ing] a legally enforceable standard." 602 F.2d at 582 n.28. That "loose managerial tool," however, does not resemble the Circular of today. See *International Graphics, Division of Moore Business Forms, Inc.* v. *United States*, 4 Cl.Ct. 186, 198 n.14 (1983). The 1979 Cost Comparison Handbook, which was issued at that time as Supplement No. 1 to the Circular, explained why revisions were being made to the Circular:

> As Government cost accounting techniques progressed, it became obvious that Circular A-76 guidelines were too general to achieve desirable uniformity, and were insufficient as a basis for comprehensive cost studies.
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[Continued]

regulation within the meaning of Section 7103(a)(9)(C)(ii). But whether an alleged violation of a rule or regulation is judicially cognizable is inapposite to whether a matter alleging that an agency did not adhere to "law, rule, or regulation" in exercising its authority is subject to the negotiated grievance procedure Congress established for collective bargaining agreements. See, *e.g.*, *Carducci* v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983) (finding no judicial review available for an employee reassignment based on "poor performance," a matter clearly within the range of matters the Statute makes grievable under a negotiated grievance procedure).

At bottom, IRS's suggestion that the Circular is not the kind of rule or regulation which is subject to Section 7121's grievance procedure misapprehends how Congress intended the grievance procedure to operate in the federal sector.[23] The grievance mecha-

[22] [Continued]

Detailed instructions for making a cost comparison are set forth in this Handbook for use by all Federal agencies.

1979 Cost Comparison Handbook at 1, 2. The Handbook was also intended "to establish consistency, assurance that all substantive factors are considered when making cost comparisons, and a desirable level of uniformity among agencies in comparative cost analyses." *Id.* at 1. In fact, the requirement in the 1979 Circular that agencies establish an appeals procedure (44 Fed. Reg. 20,561 (1979)) is a further indication that the Circular intended to impose requirements against which compliance could be measured. Thus, since 1979 the Circular and its Supplement have been redesigned specifically to remedy the "looseness" of the pre-1979 Circular.

[23] See Elkouri and Elkouri, *How Arbitration Works*, 4th ed., 53 (1985) ("Arbitral disposition of federal-sector grievances will often be governed or materially affected by laws, rules, and regulations apart from the collective bargaining agreement[.]"). See also Gentile, "Arbitration in the Federal Sector: Selected Problem Areas," 34 *Labor Law Journal*

nism encompasses not only formal rules promulgated under 5 U.S.C. 553 but also, for example, binding provisions of the Federal Personnel Manual.[24] See, *e.g.*, *Robins Air Force Base, Warner Robins, Georgia and AFGE, Local 1987*, 18 F.L.R.A. 899 (1985) and *Veterans Administration Medical Center, Fort Howard and AFGE, Local 2146*, 5 F.L.R.A. 250 (1981) (the arbitrated issue in these cases was whether the agency had failed to comply with Appendix J to Federal Personnel Manual Supplement 532-1 in denying employees 4% environmental differential pay).[25]

3. Finally, the fact that the Circular provides for an appeals procedure (Supplement at I-14 to I-15, *reprinted in* Pet. Br. App. 12a-13a)) in which employees may challenge an agency's compliance with various aspects of the Circular and its Supplement, except for "Government management decisions"

482, 484 (1983); Harkless, "Comment, Grievance Arbitration in the Federal Service," in *Proceedings of Thirty-Fourth Annual Meeting of National Academy of Arbitrators*, 206, 209 (1982).

[24] The Federal Personnel Manual is an official publication of the Office of Personnel Management containing instructions, guidance, advice and policy statements to agencies on matters of personnel management. FPM, Chapter 171, 2-1.

[25] See Elkouri and Elkouri, *How Arbitration Works*, 4th ed., 52 (1985) ("The basic function of the grievance procedure and arbitration in private employment is to assure compliance with the collective bargaining agreement. While this is also a key function of the grievance procedure and arbitration in the federal sector, there they have dual basic roles. The second and also very important function of the grievance procedure and arbitration in the federal sector is to review or police compliance with controlling laws, rules, and regulations by federal agency employers and employees alike [footnote omitted].").

(Supplement at I-14, *reprinted in* Pet. Br. App. 12a), reinforces the fact that the Circular sets standards against which compliance can be judged.

IRS acknowledges this appeals procedures, but argues (Pet. Br. at 38 n.37) that Section 7117(a)(1) of the Statute, which prevents bargaining over proposals that would bring about results inconsistent with government-wide rule or regulation, prevents bargaining over the instant proposal because the proposal allows an external review that is inconsistent with the Circular.

IRS's suggested application of Section 7117(a)(1) to the instant proposal must be rejected for two reasons. First, as the D.C. Circuit held in *EEOC* v. *FLRA*, 744 F.2d 842, 851 (1984), cert. dismissed, 476 U.S. 19 (1986), and as the Comptroller General has held,[26] the terms of the Circular simply do not

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[26] *E.g., Dyneteria, Inc.*, B-222581.3 (Jan. 8, 1987); *Contract Services Company, Inc.*, 65 Comp. Gen. 41, 42 & n.* (1985). See also *GAO Letter to Sen. Sasser*, B-223558 (Sept. 2, 1986) (referencing the availability of contracting-out review by the Small Business Administration of issues within the SBA's jurisdiction); *GAO Letter to Sen. Pryor*, B-208159.11 (Apr. 13, 1988) (referencing the availability of contracting-out review by the Department of Labor of issues within Labor's jurisdiction). For examples of Comptroller General decisions sustaining protests made in connection with an agency's contracting-out determination under Circular A-76, see, *e.g., DynCorp*, B-233727.2 (June 9, 1989) 89-1 CPD ¶ 543; *Department of the Navy—Request for Advanced Decision, Holmes & Narver Services, Inc.*, B-229558.2 and B-229558.3 (Oct. 4, 1988); *Contract Services Co., Inc.*, B-231539 (Sept. 15, 1988) 88-2 CPD ¶ 249; *Department of the Navy—Request for Reconsideration*, B-228931.2 (Apr. 7, 1988) 88-1 CPD ¶ 347; *Aspen Systems Corporation*, B-228590 (Feb. 18, 1988); *Bara-King Photographic, Inc.*, B-226408.2 (Aug. 20, 1987); *General Services Administration—Request for Reconsideration*, B-221089.2 (June 16, 1986); *Dynalectron Corporation*, 65 Comp. Gen. 290 (1986); *Department of the Navy—Request for Reconsideration*, B-220991.2 (Dec. 30, 1985). These decisions also refute IRS's contention, discussed at pages 38-40, *supra*, that agency contracting-out determinations are constrained by "no legally cognizable or enforceable constraints" (Pet. Br. at 28) and that "compliance with the Circular is satisfactory only if and to the extent that the President says it is" (Pet. Br. at 40).

bar external review of contracting-out determinations.[27]

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[27] Contrary to IRS's assertion, the terms of the Supplement do not "explicitly prohibit[]" (Pet. Br. at 27) external review; the Supplement merely states that in creating an appeals procedure, the Circular itself "does not authorize an appeal outside the agency or a judicial review" (Supplement at I-14, para. 1(2), *reprinted in* Pet. Br. App. 12a). In addition, and also contrary to IRS (Pet. Br. at 38 n.37), the terms of the Supplement only prevent the decision that is rendered by the Circular's appeals procedure from being subject to "negotiation, arbitration, or agreement"; the Supplement does not purport to block other legal avenues of redress with respect to contracting out (*e.g.*, grievance arbitration under Section 7121 of the Statute).

IRS also erroneously contends (Pet. Br. at 36 n.35) that grievance arbitration under Section 7121 of the Statute "would supplant the appeal procedures required by the Circular" and thereby "diminish the rights of disappointed bidders to protest agency actions * * *." The union's proposal would not interfere with the rights of disappointed bidders under the Circular at all. Thus, by the terms of the Circular itself (Supplement at I-14, *reprinted in* Pet. Br. App. 12a), the "award to one contractor in preference to another" would not be challengeable under the Circular's appeal procedure regardless of the union's proposal. Further, while a disappointed bidder may challenge an agency's decision to perform the work in-house, the union's invocation of the negotiated grievance procedure presupposes that bargaining unit work has been contracted out to a successful bidder. If the union were successful under the negotiated grievance procedure in challenging the agency's contracting-out determination, as previously in-

Second, even if the terms of the Circular were construed as an attempt to bar external review, Section 7117(a) of the Statute is not a vehicle through which regulations can negate the Statute's authorization of a broad scope negotiated grievance procedure. See *AFGE, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C.*, 6 F.L.R.A. 314, 322 (1981) (Office of Personnel Management regulation limiting right to grieve nonselection of a repromotion eligible cannot be applied in a manner inconsistent with scope of negotiated grievance procedures allowed under Section 7121 of the Statute). See also *NTEU* v. *Cornelius*, 617 F. Supp. 365, 371 (D.D.C. 1985) ("[The Statute] does not permit [the Office of Personnel Management] to regulate away an appeals procedure granted by Congress [footnote omitted]."). While a government-wide regulation does bar negotiations over a proposal through which a party would acquire rights that are inconsistent with that regulation, Section 7117(a)(1) does not authorize government-wide regulations to remove entitlements specifically conferred by the Statute. *E.g., Office of Personnel Management* v. *FLRA*, 864 F.2d 165, 172 (D.C. Cir. 1988) (where

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dicated (pages 30-33, *supra*), the arbitrator's award could not rescind the agency's action but only direct a reconstruction which complies with the nondiscretionary requirements of Circular A-76. Upon reconstruction, the agency could decide to keep the contract in place. Even if the agency decided to rescind the contract based upon the reconstruction, the previously successful bidder would become a disappointed bidder for the first time and could challenge the agency's new decision (based on the reconstruction) through the Circular's appeals procedure and, if necessary, to the Comptroller General (see note 26, *supra*). Accordingly, grievance arbitration under Section 7121 of the Statute does not deprive disappointed bidders of their appeal rights under the Circular.

a government-wide regulation is a mere restatement of management prerogatives listed in Section 7106(a), Section 7117(a) cannot be employed to render nonnegotiable an otherwise appropriate arrangement under Section 7106(b)(3)).

As the court below recognized in *EEOC* v. *FLRA*, 744 F.2d at 851, to allow the text of the Circular to restrict the statutory scope of grievances would impermissibly place "limitations in the statute not placed there by Congress." *Colgate-Palmolive Peet Co.* v. *NLRB*, 338 U.S. 355, 363 (1949). Were it otherwise, the logical extension of IRS's argument (Pet. Br. at 38 n.37) would allow an agency that has the authority to issue government-wide rules and regulations to alter provisions of the Statute. The mere statement of such a proposition compels its rejection.

In sum, we have shown that the Statute authorizes the negotiated grievance procedure to resolve claims that management violated a "law, rule, or regulation affecting conditions of employment" when it exercised a reserved management right, including the right to contract out. Further, we have shown that OMB Circular A-76 is a "law, rule, or regulation affecting conditions of employment" within the meaning of the Statute. Accordingly, the Authority's determination that the union's proposal which subjects the agency's contracting-out decisions to arbitral review for compliance with the mandatory provisions of OMB Circular A-76 is negotiable must be sustained.

CONCLUSION

The judgment of the court of appeals should be affirmed.[28]

Respectfully submitted.

WILLIAM E. PERSINA *
Solicitor

ARTHUR A. HOROWITZ
Associate Solicitor

ROBERT J. ENGLEHART
Attorney

* Counsel of Record

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[28] The Acting Solicitor General authorizes the filing of this brief by Respondent Federal Labor Relations Authority.

APPENDIX

5 U.S.C. 7121(a)-(c) provides:

Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(1) be fair and simple,
(2) provide for expeditious processing, and
(3) include procedures that—

(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding

arbitration which may be invoked by either the exclusive representative or the agency.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 [illegible]